CANADIAN PACIFIC (BERMUDA) LTD.

v.

NEDERKOORN PTE. LTD. & ANOR.

HIGH COURT, SINGAPORE
GOH JOON SENG J
[MOTION IN SUIT NO. 224 OF 1991]
25 OCTOBER 1991

CIVIL PROCEDURE: *Mareva Injunction - Claim for moneys- Variation - The Angel Bell Variation - The modification to pay their trade creditors in the ordinary course of business - Whether applies.*

Pursuant to a memorandum of understanding dated 4 November 1988 the parties entered into a joint venture operation which ended on 30 June 1989. A writ was served on the defendant in which a claim for the sum of $667,805 being the amount due and arising out of the joint venture. The defendants filed their defence and counterclaim on 6 March 1991.

On 17 June 1991 the plaintiff applied for a worldwide injunction which was amended *vide* a Court order that is "the Mareva injunction".

On 27 June 1991 the first defendant applied for variation of the Mareva injunction. The learned Judge allowed payment of the total sum of $218,703.59. On 4 July 1991 the first defendant filed the application to vary the said Mareva injunction.

The issue before the Court was that, the application for an order that nothing in the Mareva injunction shall prevent the first defendant from making two payments; one for the sum of US$19,910.79 received by the first defendants as brokers from the Charterers of the vessel "Wind Challenge" to the deponent owners, Tamar Shipping (Bermuda) Ltd. and the other for US$103,059.30 said to be for freight in respect of the vessel "Prima Venture L".

When the motion came up for hearing the learned Judge allowed the application in respect of the sum of US$19,910.79 for freight due to Tamar Shipping (Bermuda) Limited but disallowed the application in respect of the sum of US$103,059.30.

The first defendant appealed against the said decision. The grounds for disallowing the appeal is as follows.

Held:

[1] The Angel Bell Variation as it has come to be known, has been treated as a proper and necessary modification to enable defendants "to pay their trade creditors in the ordinary course as those creditors sought payment, and to permit the payment of trade creditors in the ordinary course of business. But it remains important to ensure that the right balance is preserved between the rights of the parties.

[2] The injunction must not be used so as to amount to an instrument of oppression which would bring about the cessation of ordinary trading. On the other hand, the Court must have regard to the interests of the plaintiff and consider whether the variation of the injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied. The Court must look at all the circumstances of the case in order to try to do justice between the parties.

[3] In the present case the sum owed to Marc Rich is not a debt incurred in the course of ordinary routine trading but represents moneys advanced in effect as trading capital. The close link between Avalon and Marc Rich is a factor to be taken into account when deciding how as a matter of discretion the interests of the ultimate holding should be balanced against those of Atlas.

[4] The proposed reimbursement of Tamar Shipping (Bermuda) Ltd., in my view is not 'carrying on business in the ordinary way, or 'for their ordinary course of business,' thus balancing the interest of the plaintiff against that of Tamar Shipping (Bermuda) Limited.

[Application to vary the mareva injunction as amended by the Court order disallowed.]

Cases referred to:
*Atlas Maritime Co. SA v. Avalon Maritime Ltd. [1991] Vol 1 LLR 563 (**cons**)*
*K/S A/S Admiral Shipping v. Portlink Ferries Ltd. [1984] 2 Lloyd's Rep 166 (**foll**)*

For the plaintiffs/ respondents - Govindarajalu Asokan
For the first defendant /appellants - Danny Chua

JUDGMENT

Goh Joon Seng J:

The plaintiffs are a company incorporated in Bermuda and are owners operators and charterers of ocean going bulk carriers.

The 1st defendants are a company incorporated in Singapore and are engaged in the brokerage of contracts for the carriage of liquid chemicals.

The 2nd defendant is a director and the principal shareholder of the 1st defendants.

The plaintiffs' claims in these proceedings arise out of a joint venture operated with the defendants pursuant to a memorandum of understanding dated 4 November 1988. The joint venture ended on 30 June 1989.

In these proceedings the plaintiffs at the material date claimed the sum of $667,805 being balance of amount due from the defendants or either of them arising out of the joint venture. The writ was duly served on the defendants who entered appearance on 13 February 1991. The defendants filed their defence and counterclaim on 6 March 1991.

On 17 June 1991 the plaintiffs applied for a world wide injunction. They obtained an order of Court which was amended by the order of Court of 18 June 1991 ('the Mareva injunction'). In so far as assets within the jurisdiction to a limit of $750,000 are concerned, the defendants are restrained until trial or further order from removing, selling, charging, dealing or otherwise disposing of them provided however that the defendants shall be entitled *inter alia* to draw and expend from a bank account or other source "a sum not exceeding $500 per week for ordinary living expenses in the case of the 2nd defendant and such sums in the case of the 1st defendants as may be required by them for their ordinary course of business" and "such further sum or sums, if any, as the plaintiffs' solicitors may from time to time agree in writing".

On 27 June 1991 the 1st defendants applied for variation of the Mareva injunction. The application was heard by Justice Sinnathuray on 28 June 1991. The learned Judge allowed payment of the total sum of $218,703.59 for staff salaries, CPF payments and other office out goings connected with the normal course of their business. In allowing $6,940 being payment

of salary to the 2nd defendant, Justice Sinnathuray disallowed the weekly payment of $500 to the 2nd defendant for his ordinary living expenses. Another sum of US$146,950.20 being payment of freight was also allowed. This was paid by the charterers of the 'Rich World' for the account of Tamar Shipping (Bermuda) Ltd., as disponent owners but the party ultimately entitled to it were the owners Iino Kaiun Kaisha Ltd. So the payment allowed was made direct by the 1st defendants to Iino Kaiun Kaisha Ltd.

On 4 July 1991 the 1st defendants filed the application herein to vary the Mareva injunction. The application was for an order that nothing in the Mareva injunction shall prevent the 1st defendants from making two payments; one for the sum of US$19,910.79 received by the 1st defendants as brokers from the charterers of the vessel 'Wind Challenger' to the disponent owners, Tamar Shipping (Bermuda) Ltd. and the other for US$103,059.30 said to be for freight in respect of the vessel 'Prima Venture L'.

The motion came up for hearing before me on 5 July 1991. I allowed the application in respect of the sum of US$19,910.79 for freight due to Tamar Shipping (Bermuda) Ltd. I disallowed the application in respect of the sum of US$103,059.30.

The 1st defendants appealed against my decision. I now give my reasons for disallowing the 1st defendants' application.

Mareva injunctions are granted to prevent dissipation or removal of assets by defendants so that they will not be available or traceable when the judgment is given against them.

From the affidavit of Anthony Mallek filed in these proceedings on 4 July 1991 in support of the 1st defendants' application, this sum of US$103,059.30 is part of the sum of $107,606.04 paid by the charterers of the Prima Venture L, Aumcon Oil Sdn. Bhd., to the 1st defendants who were the brokers for the charter party. The said sum of US$107,606.04 was paid into the 1st defendants' account with the Bank of America on or about 25 June 1991 that is after the date of the Mareva injunction. After deduction of the 1st defendants' brokerage commission, the sum of US$103,059.30 was due as freight to the disponent owners Seachem Tankers Ltd., of Kingston. Due to the Mareva injunction, the 1st defendants were unable to remit this sum of US$103,059.30 to Seachem Tankers Ltd. Accordingly Tamar Shipping (Bermuda) Ltd., paid on behalf of the 1st defendants the sum of US$103,059.30 to Seachem Tankers Ltd. Hence the application for this payment to reimburse Tamar Shipping (Bermuda) Ltd.

As appears from Exhibit GA1 to the affidavit of Govindarajalu Asokan filed herein on 17 June 1991 Tamar Shipping (Bermuda) Ltd., is a company incorporated in Bermuda with 50,000 issued shares of US$10 each par value. Of these 50,000 shares, the 2nd defendant holds 37,497 whilst another Nederkoorn by the name of Matthys Arjen Nederkoorn holds 12,500. Three other shareholders hold one share each.

In *Atlas Maritime Co. S.A. v. Avalon Maritime Ltd.* the 'Coral Rose' [1991] Vol 1 LLR 563, the defendants were a company registered in Gibraltar and the beneficial owners of the defendants were a Liberian company which was the wholly owned subsidiary of Marc Rich & Co. AG of Zug. In October 1987 the defendants bought 'Coral Rose'. They decided to sell it in 1988 and then chose not to go ahead with the sale. The plaintiffs contended that there was an oral contract made on 6 June 1988 and confirmed by telex of the same date by which the defendants had agreed to sell the 'Coral Rose' to the plaintiffs for US$15.5 million. The plaintiffs contended that the defendants were in breach of contract and alleged a loss of US$7.5 million.

On 16 March 1989 the plaintiffs issued the writ and obtained a Mareva injunction expressed in world wide terms restraining the defendants from disposing of diminishing parting or dealing with any of their assets save in so far as they exceeded US$7.5 million. The injunction however stated that the defendants could sell the 'Coral Rose' provided the sum of US$7.5 million from the proceeds of sale was paid into a bank account in London.

In May 1989, the defendants sold the vessel to another purchaser by which time the Mareva injunction had been varied by a further order which reduced the sum covered by the injunction to US$3 million.

After the sale of the vessel the entire proceeds except for the US$3 million were paid to Marc Rich. There was affidavit evidence that the defendants were a mere shell company with no physical assets and that the defendants had throughout been financed by their parent Marc Rich. The defendants applied for an order permitting them to pay the US$3 million to Marc Rich.

The application was dismissed by the High Court. The defendants appealed unsuccessfully to the Court of Appeal. In dismissing the appeal Lord Justice Nell at pp. 568-569:

> ... there is some evidence that Avalon owes money to Marc Rich in excess of US$3 million. The question remains, however, whether the existence of this debt entitles Avalon to the discharge or variation of the injunction.
>
> It is always important to remember that a plaintiff who has obtained a Mareva injunction is not in the same position as a secured creditor and that he has no proprietary claim to the assets which are subject to the injunction. It follows therefore that there can be no objection in principle to a defendant being allowed by the Court to employ such assets for the purpose of his business or, where appropriate, to pay living expenses or legal fees. Accordingly, Mareva injunctions often include specific provisions to enable expenses to continue to be paid, or, where the original order is insufficient, the Court will make a variation to permit expenses to be paid or debts to be discharged.
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> In the present case Avalon seek the discharge of the injunction granted in March 1990 to enable them to pay part of what is said to be owed by them to Marc Rich. It is recognized that if the order is made Avalon will be left without assets, but it is submitted that the Court should treat the debt as an ordinary debt owed to a creditor and that the fact that Marc Rich is the ultimate holding company is fortuitous. The payment would undoubtedly be permitted if the money had been lent by a bank and, it is said, the same approach should be adopted on the present facts.
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> In the circumstances of the present case I feel bound to reject this submission and to uphold the Judge's decision, though on different grounds.

In *Derby & Co. Ltd. v. Weldon* (Nos 3 and 4) [1990] Ch 65, Lord Donaldson MR stated the principle underlying the Mareva jurisdiction as follows:

> The fundamental principle underlying this jurisdiction is that, within the limits of its power no Court should permit the defendant to take action designed to ensure that subsequent orders of the Court are rendered less effective than would otherwise be the case.

But he went on to indicate two important qualifications:

(a) It is not its purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim.

(b) Nor is its purpose to place the plaintiff in the position of a secured creditor.

In the present case we are concerned with the qualification relating to the defendant carrying on business in the ordinary way.

This qualification has been given effect to in many other cases. In *The Iragi Ministry of Defence v. Arcepey Shipping Co. SA (The Angel Bell)* [1980] 1 Lloyd's Rep 632; [1981] QB 65 Mr. Justice Robert Goff varied a Mareva injunction to allow the defendant to repay loans because he was:

> ... seeking in good faith to make payments which he (considered) he should make in the ordinary course of business.

The Angel Bell variation, as it has come to be known, has been treated as a proper and necessary modification to enable defendants 'to pay their trade creditors in the ordinary course as those creditors sought payment' (*K/S A/S Admiral Shipping v. Portlink Ferries Ltd.* [1984] 2 Lloyd's Rep 166 p. 167) and to permit 'the payment of trade creditors in the ordinary course of business' (*Avant Petroleum Inc. v. Gatoil Oveseas Inc.* [1986] 2 Lloyd's Rep 236 at p. 242). But it remains important to ensure that the right balance is preserved between the rights of the parties. The injunction must not be used so as to amount to an instrument of oppression which would bring about the cessation of ordinary trading. On the other hand, the Court must have regard to the interests of the plaintiff and consider whether the variation of the injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied. The Court must look at all the circumstances of the case in order to try to do justice between the parties.

There are two features about the present case which, taken together, I regard as being of particular significance.

In the first place the sum owed to Marc Rich is not a debt incurred in the course of ordinary routine trading but represents moneys advanced in effect as trading capital. In the second place the close link between Avalon and Marc Rich is a factor to be taken into account when deciding how as a matter of discretion the interests of the ultimate holding company should be balanced against those of Atlas.

The proposed reimbursement of Tamar Shipping (Bermuda) Ltd. (of which the 2nd defendant is the principal shareholder and another Nederkoorn the other substantial shareholder), by the 1st defendants (of which the 2nd defendant is the principal shareholder) in my view is not 'carrying on business in the ordinary way' or 'for their ordinary course of business'. Thus balancing the interest of the plaintiffs against that of Tamar Shipping (Bermuda) Ltd., I disallowed the application to vary the Mareva injunction of 17 June 1991 as amended by the order of Court of 18 June 1991.

Also found at [1991] 1 CLJ 721